

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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January 7, 2009

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**Re: *Simmons v. Bayhealth Medical Center, Inc.*  
C.A. No. 06C-08-136-JRS**

Dear Counsel:

The Court is in receipt of Mr. Ramunno's Motion for Reargument of the Court's Order directing that plaintiff's counsel pay as sanctions reasonable costs incurred by the defendant as a result of the postponement of the December 15, 2009 trial in this case. Contrary to Mr. Ramunno's motion, the Court did not impose sanctions pursuant to Superior Court Civil Rule 11(B). Rather, the Court ordered counsel to pay costs associated with the trial continuance because counsel did not comply with the Court's direction that Mr. Simmons' trial deposition be taken in

advance of trial in order to avoid the need to continue the trial should Mr. Simmons physical condition render him unable to appear in person.<sup>1</sup> Rule 11 was neither mentioned nor considered by the Court at the time the sanctions order was entered.

As stated at some length on the record when we were last together, the issue of Mr. Simmons' ability to appear for trial was addressed at the first pretrial conference in this matter. It was reported then that Mr. Simmons may not physically be able to appear for trial. He was, at the time, in the hospital. Both parties and the Court agreed that the trial should not be continued given the age of the case, the costs associated with trial preparation and expert fees, and the substantial delay that would be caused by a trial continuance given the Court's heavy trial schedule. The Court directed that in order to avoid the need for a trial continuance plaintiff's counsel should secure a *de bene esse* deposition of Mr. Simmons to be used if (and only if) Mr. Simmons could not appear live at trial. Plaintiff's counsel, for whatever reason, chose not to comply with that direction. As a direct consequence of that decision, the Court was forced to continue the trial upon learning that Mr. Simmons, yet again, had been hospitalized on the Friday before the Monday trial.<sup>2</sup>

The Court is satisfied that plaintiff's counsel should bear the reasonable costs incurred by the defendant as a result of the trial continuance (which defendant

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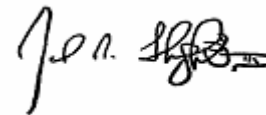
<sup>1</sup>See *Cebenka v. The Upjohn Co.*, 559 A.2d 1219, 1220 & 1225 (Del. 1989)(holding that trial court has inherent authority to impose sanctions for violations of order relating to pretrial procedure and management).

<sup>2</sup>It should be noted that defense counsel offered to travel to the hospital to take a video trial deposition of the plaintiff on the morning of trial but, despite reports that plaintiff's condition had improved, plaintiff's counsel vehemently opposed that suggested compromise.

opposed).<sup>3</sup> Mr. Ramunno states that the costs, as reported to him, are \$1,000.00, which amount represents defendant's liability expert's trial cancellation fee. The Court notes that this witness was to appear live at trial. Her appearance was cancelled with only two days notice. Under these circumstances, the witness was not unreasonable in charging a cancellation fee. On this record, however, the Court cannot determine the reasonableness of the charge. Accordingly, defense counsel shall supply the Court, within seven (7) days, with appropriate support for the \$1,000.00 cancellation fee. Plaintiff's counsel may respond within seven (7) days (limited only to the reasonableness of the charge).

Based on the foregoing, the motion for reargument is **DENIED**.<sup>4</sup>

Very truly yours,

A handwritten signature in black ink, appearing to read "J. R. Slights, III", with a horizontal line drawn through the end of the signature.

Joseph R. Slights, III

JRS, III/sb

Original to Prothonotary

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<sup>3</sup>See *Dean-Seeney v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 3380119 \*2 (Del. Super.)(holding that the “award of costs for expert witness testimony is committed to the sound discretion of the trial court.”); *Cebenka*, 559 A.2d at 1226 (holding that trial court acted within its discretion when it ordered counsel to pay fees and costs as sanctions when expert deposition was cancelled because of counsel's neglect and in violation of a court order).

<sup>4</sup>Mr. Ramunno's request that the Court “certify this question of law to the Supreme Court” is likewise denied. He has made no attempt to comply with either Delaware Supreme Court Rule 41 or Rule 42, and the Court seriously doubts that he could do so if he tried.